Eikobina (M) Sdn Bhd v Mensa Mercantile (Far East) Pte Ltd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-25 OF 1992
HARUN HASHIM, PEH SWEE CHIN, WAN YAHYA SCJJ
4 FEBRUARY 1994

Contract *— Damages — Loss of profits — Remoteness of damage — Goods sold to sub-buyers before delivery from supplier — Supplier failed to deliver goods — Whether loss of profits on sub-sales claimable — Whether too remote — Contracts Act 1950*

Contract *— Damages — Loss of opportunity — Remoteness of damage — Whether too remote — Contracts Act 1950*

Contract *— Damages — Measure of damages — Available market — Date of assessment — Whether at date of breach or any other date — Sale of Goods Act 1957 ss 57 & 61*

Words and Phrases *— 'Put on notice'*

The appellant ('the vendor') agreed to sell the respondent ('the buyer') 24 units of heavy construction equipment ('the goods'). After the agreement was entered into but before delivery of the goods, the buyer resold 15 units to sub-buyers, leaving nine units unsold. On 27 July 1987, the date of delivery of the goods, the vendor failed to deliver the goods and the buyer sued for: (i) specific performance of the agreement; (ii) general damages for breach of contract; and (iii) damages for loss of agency to sell other units of similar goods ('the other units') for the vendor. The claim was disputed by the vendor who also counterclaimed for work done and materials supplied. The trial judge found for the buyer but declined to grant specific performance, awarding instead damages for breach of contract and at the same time dismissing the counterclaim of the vendor. [See [1989] 2 MLJ 170.]

The buyer's and vendor's appeals to the Supreme Court were dismissed and the decision of the trial judge confirmed, the court upholding the order for the vendor to pay the buyer: (a) general damages for breach of contract; and (b) damages 'on the loss of agency rights' over the other units. The damages fell to be assessed by a registrar of the High Court. [See [1989] 3 MLJ xlix.] The registrar awarded damages for: (i) loss of profit at RM1,766,429 based on the market price of the goods on a date other than the date of breach; (ii) loss of commission at RM150,000 (in respect of the loss of agency rights); and (iii) loss of opportunity at RM456,000 due to loss of confidence in the buyer on the part of its business associates and customers. On appeal by the vendor before the trial judge, the damages awarded were confirmed except that the loss of commission was reduced from RM150,000 to RM120,000. In this appeal, the vendor abandoned the part of the appeal as related to the loss of commission while the appeal against the other two heads were vigorously pursued.

Held, allowing the appeal:

(1) After liability on a contract is established, two questions are involved in the assessment of damages. The first is that no compensation can be awarded for damage that is too remote and the second is that in assessing damage that is not too remote, the correct measure of damages must be adopted. In this case, the registrar had totally failed to apply his mind to the question of the remoteness of damages. The matter of sub-sales was not communicated to the vendor at the time of the contract. Thus the loss of profit on 15 units of the goods sold before delivery and after contract could not be claimed as it was too remote by virtue of both rules in *Hadley v Baxendale*.[2] The specific loss of profit for the remaining unsold nine units of goods could not also be claimed for the same reason, specifically because of the first rule in *Hadley v Baxendale*.[2] Therefore, the award of loss of profit in the sum of RM1,766,429 made by registrar and upheld by the judge below could not stand and had to be set aside.

(2) The normal measure of damages is basically the difference between the contract price and market price at the time of the breach where there is an available market for the goods. There was evidence that similar goods were readily available in the market and the market price in the instant case would be the market price or current price of the goods at the date of breach, 27 July 1987, when the vendor ought to have delivered the goods. Thus the assessment of damages for loss of profit as on the date of trial or on any date other than the date of breach could not stand.

(3) The buyer had failed to prove any damage for the non-delivery of the goods, apart from proving a breach of contract for such non-delivery as there was in fact no increase in price for goods similar to the goods in question. At the time of the breach, business in second-hand equipment similar to the goods in question was also very bad.

(4) The award for loss of opportunity at RM456,268 could not pass the test of remoteness laid down in *Hadley v Baxendale*,[2] either on the first rule or the second rule in question and had to be set aside.

(5) Though the buyer had failed to prove damage for both loss of profit and loss of business opportunity, it had succeeded in proving loss of commission. The challenge against such award was withdrawn at the outset of the hearing and the award of RM120,000 for loss of commission therefore stood.

(6) Being put on notice means at least and includes a situation where the vendor can be said to have any actual knowledge of such joint venture, such knowledge having been conveyed to the vendor with a sufficient degree of deliberateness in giving to the vendor, at least a very clear hint that there was a prospect of such loss that could be caused to the buyer for which compensation would be payable by the vendor in case of default by the vendor.

A **[Bahasa Malaysia summary**

Perayu ('penjual itu') telah bersetuju menjual kepada responden ('pembeli itu') 24 unit jentera pembinaan berat ('barangan itu'). Selepas perjanjian itu diikat tetapi sebelum barangan itu dihantar-serah, pembeli itu telah menjual semula 15 unit kepada pembeli B semula, meninggalkan sembilan unit tidak dijual. Pada 27 Julai 1987, tarikh hantar-serahan barangan itu, penjual itu gagal menghantar-serah barangan itu dan pembeli itu telah mendakwanya untuk: (i) pelaksanaan spesifik perjanjian itu; (ii) ganti rugi am untuk kemungkiran kontrak; dan (iii) ganti rugi untuk kehilangan agensi C menjual unit lain barangan yang sama ('unit lain itu') untuk penjual itu. Tuntutan itu telah dipertikaikan oleh penjual itu yang juga telah membuat tuntutan balas untuk kerja yang dijalankan dan bahan yang dibekalkan. Hakim perbicaraan telah membuat keputusan memihak kepada pembeli itu tetapi enggan memberi pelaksanaan spesifik, dan sebaliknya mengawardkan ganti rugi untuk kemungkiran kontrak dan D pada masa yang sama menolak tuntutan balas penjual itu. [Lihat [1989] 2 MLJ 170.]

Rayuan pembeli itu dan penjual itu ke Mahkamah Agung telah ditolak dan keputusan hakim perbicaraan disahkan. Mahkamah itu mengekalkan perintah supaya penjual membayar pembeli: (a) ganti rugi E am untuk kemungkiran kontrak; dan (b) ganti rugi 'untuk kehilangan hak agensi' ('on the loss of agency rights') atas unit lain itu. Ganti rugi itu perlu ditaksirkan oleh pendaftar Mahkamah Tinggi. [Lihat [1989] 3 MLJ xlix.] Pendaftar telah memberikan ganti rugi untuk: (i) kehilangan untung pada RM1,766,429 berdasarkan harga pasaran barangan itu pada suatu tarikh selain daripada tarikh kemungkiran kontrak itu; (ii) F kehilangan komisyen pada RM150,000 (dari segi kehilangan hak agensi); dan (iii) kehilangan peluang pada RM456,000 akibat kehilangan keyakinan dalam pembeli itu oleh rakan perniagaan dan pelanggannya. Pada rayuan penjual di hadapan hakim perbicaraan, ganti rugi yang telah diawardkan itu disahkan kecuali kehilangan komisyen telah dikurangkan dari G RM150,000 ke RM120,000. Dalam rayuan ini, penjual telah meninggalkan bahagian rayuan yang berkaitan dengan kehilangan komisyen manakala rayuan terhadap dua tuntutan yang lain telah dibuat dengan bersungguh-sungguh.

Diputuskan, membenarkan rayuan itu:

H (1) Selepas liabiliti atas sesuatu kontrak diwujudkan, dua soalan terlibat dalam pentaksiran ganti rugi. Yang pertama adalah bahawa pampasan tidak boleh diawardkan untuk kerosakan yang terlalu di luar dugaan dan kedua adalah bahawa apabila mentaksirkan ganti rugi untuk kerosakan yang tidak terlalu di luar dugaan, cara I taksiran ganti rugi yang betul mesti digunakan. Di dalam kes ini, pendaftar telah gagal sama sekali untuk menumpukan perhatiannya kepada soalan kerosakan luar duga. Perkara mengenai jualan semula itu tidak dikomunikasikan kepada penjual itu. Oleh itu kehilangan untung atas 15 unit barangan itu yang dijual sebelum

barangan itu dihantar-serah tetapi selepas kontrak itu diikat tidak boleh dituntut kerana terlalu di luar dugaan mengikut kedua-dua rukun *Hadley v Baxendale*.[2] Kehilangan spesifik untung atas baki sembilan unit yang tidak dijual itu juga tidak dapat dituntut atas sebab yang sama, secara spesifik kerana rukun pertama *Hadley v Baxendale*.[2] Oleh itu, award untuk kehilangan untung sebanyak RM1,766,429 yang dibuat oleh pendaftar dan disahkan oleh hakim mahkamah bawah tidak berkuat kuasa dan mesti diketepikan.

(2) Cara taksiran ganti rugi yang biasa pada dasarnya merupakan perbezaan di antara harga kontrak dan harga pasaran pada masa kemungkiran kontrak itu di mana terdapat suatu pasaran sedia ada untuk barangan itu. Terdapat bukti bahawa barangan yang sama mudah didapati di pasaran dan harga pasaran dalam kes ini merupakan harga pasaran atau harga kini barangan itu pada tarikh kemungkiran kontrak, iaitu 27 Julai 1987, apabila penjual sepatutnya menghantar-serah barangan itu. Oleh itu, pentaksiran ganti rugi untuk kehilangan untung pada tarikh perbicaraan atau sebarang tarikh selain daripada tarikh kemungkiran kontrak tidak dapat berkuat kuasa.

(3) Penjual itu telah gagal membuktikan sebarang kerosakan akibat kegagalan untuk menghantar-serah barangan itu, selain daripada membuktikan kemungkiran kontrak disebabkan barangan itu tidak dihantar-serah, kerana pada hakikatnya, tidak terdapat kenaikan harga untuk barangan yang serupa dengan barangan itu. Pada masa kemungkiran kontrak, keadaan perniagaan dalam jentera terpakai yang serupa dengan barangan itu juga sangat buruk.

(4) Award untuk kehilangan peluang sebanyak RM456,268 itu tidak lulus ujian luar dugaan yang ditetapkan di dalam *Hadley v Baxendale*,[2] sama ada atas rukun pertama atau kedua dan mesti diketepikan.

(5) Walaupun pembeli itu telah gagal membuktikan kerosakan untuk kedua-dua kehilangan untung dan kehilangan peluang perniagaan, ia berjaya membuktikan kehilangan komisyen. Cabaran terhadap award itu telah ditarik balik pada permulaan pendengaran dan oleh itu award sebanyak RM120,000 untuk kehilangan komisyen masih kekal.

(6) Keadaan di mana seseorang itu diberi notis bermakna sekurang-kurangnya dan termasuk suatu situasi di mana penjual itu boleh dikatakan mempunyai pengetahuan sebenar tentang usaha sama itu, pengetahuan sedemikian disampaikan kepada penjual itu dengan suatu darjah kesengajaan yang mencukupi untuk memberi penjual itu sekurang-kurangnya suatu bayangan jelas bahawa terdapat kemungkinan bahawa kerugian seperti itu akan diakibatkan kepada pembeli itu untuk mana pampasan akan dibayar oleh penjual itu jika keingkaran dilakukan oleh penjual itu.]

Notes

For a case on the measure of damages, see 3 *Mallal's Digest* (4th Ed) para 1045.

Cases referred to

1 *Liesbosch Dredger v Edison SS* [1933] AC 449 (refd)
2 *Hadley v Baxendale* (1854) 9 Ex 341 (folld)
3 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528; [1949] 1 All ER 997 (folld)
4 *Lee Heng & Co v Melchers & Co* [1963] MLJ 47 (folld)
5 *Bulsing Ltd v Joon Seng & Co* [1972] 2 MLJ 43 (distd)
6 *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 (distd)
7 *Johnson v Agnew* [1979] 1 All ER 883; [1980] AC 367; [1979] 2 WLR 487 (distd)
8 *Thol v Henderson* (1882) 8 QBD 457 (refd)
9 *Williams v Reynolds* (1865) 6 B & S 495 (refd)
10 *Kwei Tek Chao v British Traders & Shippers* [1954] 2 QB 459; [1954] 1 All ER 779; [1954] 2 WLR 365 (folld)
11 *Hall v Pim* (1928) All ER Rep 763 (refd)

Legislation referred to

Sale of Goods Act 1957 ss 57, 61
Sale of Goods Act 1893 ss 51, 54 [UK]

Appeal from: Civil Suit No D3–22–254 of 1987 (High Court, Kuala Lumpur)

M Nagarajah (*SC Lim* with him) (*Shook Lin & Bok*) for the appellant.
Wong Kim Fatt (*Gulam & Wong*) for the respondent.

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): This is an appeal against an assessment of damages in respect of a vendor who failed to deliver goods to the buyer. An acquaintance with the brief history and material facts leading to this appeal will be essential.

The appellant (hereafter 'the said vendor'), was sued by the respondent, (hereafter 'the said buyer'), for failure to deliver 24 units of heavy construction equipment such as 'truck cranes', 'pile drivers', etc, (hereafter 'the goods in question' wherever it is appropriate) for specific performance of the agreement to sell and deliver the goods in question, general damages for breach of contract and for damages, specifically, for loss of agency to sell for the said vendor, other units of similar equipment left at the said vendor's 'yard' in Kapar, Port Klang. The claim was disputed by the said vendor who also counterclaimed for work done and materials supplied. The action was tried and the learned judge found against the said vendor. The learned judge discretionally declined however, to grant specific performance, but instead awarded damages for breach of contract and costs to the said buyer, at the same time dismissing the counterclaim of the said vendor, with costs.

From the learned judge's decision, an appeal was lodged against it to the Supreme Court which dismissed the appeal and confirmed the decision of the learned judge, upholding the learned trial judge's order for the said

vendor to pay the said buyer: (a) general damages for breach of contract to be assessed; and (b) for damages 'on the loss of agency rights' over the other units of equipment at Kapar. The damages fell to be assessed by a registrar of the High Court.

In the events that have turned out, the learned registrar assessed the damages as follows:

(1) loss of profit at RM1,766,429;
(2) loss of sale commission at RM150,000 (in respect of loss of agency rights); and
(3) 'loss of opportunity' at RM456,000.

On appeal by the said vendor before the learned trial judge, the damages aforesaid were confirmed except that the loss of sale commission was reduced from RM150,000 to RM120,000.

On further appeal by the said vendor before us against the award of all damages as assessed, the part of the appeal as related to loss of sale commission was abandoned, while the appeal against the other two heads as stated above, was vigorously pursued.

On the award for the loss of profits, for the purpose of this judgment, it will not be necessary to set out the details of the evidence which preoccupied a great deal of time of the learned registrar, apart from saying that out of the goods in question and agreed to be sold, namely, 24 units of the equipment, the said buyer had resold, after agreement of sale and purchase but before delivery of the same to the said buyer, 15 of them to other sub-buyers leaving nine units remaining unsold. The loss of profits was arrived at RM1,766,400 by deducting the original purchase price agreed by both parties from a combined figure of proceeds of sub-sales of 15 units sold by the said buyer before delivery and the total value of the unsold nine units as given by PW1, the said buyer's chief executive officer, in his evidence in March 1990 before the learned registrar as the value or price (as in March 1990) at which he could have sold and realized. The value or price he gave was higher than the fair market value fixed by an appraiser, who was called by the said buyer itself as a witness, on the remaining unsold nine units as at 1 February 1989, a date adopted by the appraiser at the request of the said buyer. The appraiser of the said buyer in his report gave the fair market value at RM1,509,000 as the value as at 1 February 1989, a figure lower than the RM1,700,000 claimed by the said buyer's chief executive officer in evidence.

It will be pertinent to refer to such evidence or findings of the learned judge who tried the main case in so far as they are relevant to the instant appeal before us. The learned judge found that the date of completion of the contract between the parties was 27 July 1987 and that the said vendor was in breach on 27 July 1987 when payment tendered by the said buyer was not accepted by the said vendor; in other words, failure or refusal by the said vendor to deliver the goods in question on 27 July 1987. The learned judge further declined to grant specific performance to the said buyer who obtained judgment in its favour, for the learned judge found to the effect, inter alia, that the said buyer had failed to show that machines of the same

kind as the goods in question were not easily available in the market and the said buyer's chief executive officer himself testified that it was possible to buy such machines in large quantities in the market. After considering other evidence the learned judge found: 'Since such goods can be located in the market, either singly or in bulk ... I consider that damages is an equally adequate remedy for the defendant's breach,' ie instead of granting specific performance.

As regards other evidence having some bearing on this claim for loss of profit, the date of the contract or the 'memorandum' as referred to by the parties hereto was 6 May 1987. Of the 24 units of the goods in question, 15 units were sold on various dates beginning from 20 May 1987 to 20 July 1987 to some sub-buyers from the said buyer, a period after the date of the contract and before the said completion date. Except that in cross-examination, it emerged that the said buyer bought and sold similar machines or goods, there is nothing from the printed evidence recorded before both the learned judge and the learned registrar to show that the said vendor was put on notice, before or at the time of contract, that these machines would be sold at the particular prices at which they were later sold, and, or to be sold to particular persons. Such evidence, by its very nature could not possibly be available as the sub-sales were transacted by the said buyer after the date of contract and before the anticipated delivery.

As regards the damages for loss of opportunity at RM456,268, the evidence from the said buyer's chief executive officer was quite brief. The gist of such evidence is as follows. He said before the said buyer became acquainted with the said vendor, the said buyer and one Seng Choon Construction Pte Ltd (hereafter 'Seng Choon') had a 'joint venture agreement' on a 50:50 basis on profit in buying and selling heavy equipment, with the said buyer being in charge of buying and selling and Seng Choon being responsible for financing. On a date in March 1987, around 9 March 1987, the joint venture group bought and sold heavy equipment, making a profit, 50% of which went to the said buyer as its share of profits amounting to RM150,943. The second sale transacted by the joint venture group was with a named party this time, viz Kumagai Gumi Co Ltd of Japan, and the said buyer's share of profits was RM293,250. The third business transaction was with the said vendor herein, who breached the contract and as a result, the said buyer's business associates and customers lost confidence in the said buyer. The next time, Seng Choon went it alone to buy directly from another seller called Sem Wah Corp and the said buyer's role this time was reduced to that of 'a witness' and received S$83,269 representing a mere 10% of the total profit. The said buyer said that it suffered a loss of 40% profit, ie RM456,268 in Malaysian currency.

Again from the evidence before the learned registrar and the evidence before the learned judge in the main trial, there is not an iota of evidence to show that the said vendor was put on notice before or at the time of contract, of this joint venture with Seng Choon. Being put on notice means at least and includes a situation where the said vendor can be said to have any actual knowledge of such joint venture, such knowledge having been conveyed to the said vendor with a sufficient degree of deliberateness in

giving to the said vendor, at least a very clear hint that there was a prospect of such loss that could be caused to the said buyer for which compensation would be payable by the said vendor in case of default by the said vendor.

Perhaps it was due to an undue and in fact, the only emphasis on the part of the said buyer before the learned registrar of a submission similar to the usual formulation that a plaintiff is to be put in the same position as far as money can do as he would have been in had the breach not been committed that the result appears to be these rather astronomical figures that were awarded by the learned registrar approaching the proportion of those ludicrous American awards one reads about so often in the newspapers. The learned registrar has erred on a vital point, in that he has totally failed to apply his mind to the question of the remoteness of damages, an error which has been by no means at all rare on which we will express our view a bit more elaborately.

After liability on a contract is established and when it comes to assessment of damages, two questions are always involved. The first is that no compensation can be awarded for damage that is too remote and the second is that in assessing damage that is not too remote, the correct measure of damages must be adopted, ie the correct and usual principles of quantifying the monetary compensation must be employed.

The courts have long recognized that a contract breaker could not be liable for all consequences which flow naturally from a breach of contract and that they must draw a line somewhere, otherwise the consequences would be, inter alia, ruinous to the contract breaker. Thus, certain of such ensuing consequences would be regarded as too remote to be claimable, 'not perhaps on ground of pure logic but simply for practical reasons', to quote a dictum of Lord Wright in *Liesbosch Dredger v Edison SS*[1] made in a similar vein.

The meaning of remoteness of damage was finally settled in the landmark case of *Hadley v Baxendale*[2] as follows :

> When two parties have made a contract which one to them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may be fairly and reasonably considered either arising naturally, ie according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it ...

There are two distinct rules in the above passage. The above passage is followed in fact by another passage in the same paragraph of the case report, which is reproduced below for a better understanding of the above passage:

> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances

A were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this B advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract.

The meaning was further explained extremely well by Asquith LJ in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd.*[3]

C According to Asquith LJ, the loss recoverable ought to be reasonably foreseeable by the contract breaker. Whether the contract breaker can reasonably foresee such loss depends on the knowledge possessed by him. There are two kinds of knowledge, first, the imputed knowledge, ie that as a reasonable person, he is taken to know the sort of loss resulting from the D breach in the usual course of things, and this is the first rule in *Hadley v Baxendale.*[2]

There is another type of knowledge which is actual knowledge (instead of the imputed knowledge mentioned earlier), and the contract breaker has such actual knowledge of special circumstances outside the usual course of E things that a breach in these special circumstances would be liable to cause more or additional loss which can be recovered in place of the ordinary loss; this much for the remoteness of damage first.

Next, what is the normal measure of damages in the instant case in respect of sale of the goods in question between the said vendor and the said buyer?

F The relevant sections in our Sale of Goods Act 1957 are ss 57 and 61. They are set out below:

> 57 Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.
>
> 61 (1) Nothing in this Act shall affect the right of the seller or the buyer to G recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.
>
> (2) In the absence of a contract to the contrary, the court may award interest at such rate as it thinks fit on the amount of the price —
>
> H (a) to the seller in a suit by him for the amount of the price — from the date of the tender of the goods or from the date on which the price was payable;
>
> (b) to the buyer in a suit by him for the refund of the price in a case of breach of the contract on the part of the seller — from the date on which the payment was made.

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Apparently, almost corresponding sections appear in ss 51 and 54 of the UK's Sale of Goods Act 1893 ('the Act') which are set out as follows:

51 Damages for non-delivery

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver.

54 Interest and special damages

Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case whereby by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

It has been often correctly said that s 51(2) and (3) of the UK Act are a mere enactment of the first rule in *Hadley v Baxendale*[2] and s 54, of the second rule.

In our s 57, we do not have s 51(2) and (3) of the UK Act but our s 61 is the more detailed corresponding section of s 54 of the UK Act. Therefore, English common law as embodied in the said s 51(2) and (3) applies and in this connection, please see a similar observation by the Court of Appeal in *Lee Heng & Co v Melchers & Co*[4] in dealing there with another section, ie s 59 of our then Sale of Goods Ordinance 1957, in connection with the application of English common law.

Having regard to the foregoing paragraphs, the normal measure of damages from the case law is, as stated in s 51(3) of the UK Act as set above, basically the difference between the contract price and market price at the time of the breach where there is an available market for the goods in question.

It is pertinent to point out straightaway that the market price in the instant case would be, according to the normal measure of damages, the market price or current price of the goods in question as at 27 July 1987 (date of breach as found by the learned judge at the main trial) when the said vendor ought to have delivered the goods in question.

The said buyer submitted otherwise, however, that the market price should be based not on the date of the breach and the learned registrar appears to have totally agreed with such submission. Thus 15 units of the goods in question had their market value assessed by the learned registrar as at the date of trial in March 1990, and also at 1 February 1984, which the appraiser, called by the said buyer to court to testify, adopted as instructed by the said buyer.

The court may at this stage just as well deal with such submission described above which the lower court found acceptable. After consideration, we would however have to reject this submission for the following reasons.

This buyer's submission about the basis of time for evaluating market price not being the time of breach, was said to be first supported by *Bulsing Ltd v Joon Seng & Co*[5] and *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd.*[6] On an examination of these cases, the normal measure of damages was found not applicable totally because there was an abnormal absence of an essential element for the normal measure of damages to apply, viz the goods concerned respectively in both cases were not available in the market. In the instant case, there was evidence from even the said buyer and also the said vendor which supported the finding of learned judge at the main trial that goods similar to the goods in question in the instant case were readily available at the market, and we would add, should the said buyer bother to buy them, on failure by the said vendor to deliver them.

This erroneous submission was further said to be supported by the case from House of Lords in *Johnson v Agnew*,[7] particularly by an obiter dictum of Lord Wilberforce at p 896 as follows:

> The general principle for the assessment of damages is compensatory, ie that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognized and embodied in s 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

Johnson v Agnew[7] is an extraordinary case in which to do justice in a very unusual situation, a normal principle of the common law rule was departed from. The plaintiff there had obtained a decree of specific performance of a contract for the sale of land (not goods) in a case in equity, but the default of the defendant in failing to pay the balance of the purchase price after the date of the decree had caused the ultimate impossibility of completion of the contract or the implementation of the decree. The plaintiff there was held entitled by the House of Lords to apply subsequently after such impossibility, and to obtain an order of discharge of the decree of specific performance, an order terminating the contract and an order also for damages for breach of contract, to be assessed as at common law, because the plaintiff, who had earlier elected for specific performance, was electing simply for the contract to be continued under the court's control, according to Lord Wilberforce. When discussing the damages to be assessed, Lord Wilberforce in the obiter dictum stated that the normal measure of damages for breach of contract of sale of land in assessing the market value at the date of breach was a principle which had (incidentally) by then been embodied in s 51 of the UK Act. The obiter dictum of Lord Wilberforce cannot be taken to mean that a normal measure of damages can be departed from at one's whim and fancy in the face of normal circumstances responsive to or attracting the application of such normal measure of damages even though the law is not always strait-jacketed. In our instant appeal, the normal circumstances were there, viz especially that goods similar to the goods in question were readily available at the market at the time of breach, ie at the time when the goods in question ought to have been delivered or,

if no time was fixed, then at the time of refusal to deliver the goods in question.

Basically, this erroneous submission of the said buyer ignored the finding of the learned judge in regard to the aforesaid normal circumstances so that the normal measure of damages ought to apply, ie damages ought to have been assessed as on the date of breach, ie 27 July 1987.

Thus the assessment of damages for loss of profit as on the date of trial or on any date other than the date of breach cannot stand in the circumstances of the instant case.

We now revert further to the two important questions aforesaid when it comes to assessment of damages.

First, on the question of remoteness, we will have to apply *Hadley v Baxendale*.[2] In this case there was an available market for the goods similar to the goods in question, a loss of profit as claimed is not a loss resulting from the first rule in *Hadley v Baxendale*,[2] ie a loss that follows in the usual course of things, a proposition that is supported by a very strong and discernible trend in the cases as to be beyond argument for us unless any given case is distinguishable on some exceptional ground. Thus, in *Thol v Henderson*,[8] such loss of profit was not claimable even if a seller knew that the buyer had bought with a general intention to resell; and in *Williams v Reynolds*,[9] when the seller knew the buyer would resell before delivery. In *Kwei Teck Chao v British Traders*,[10] the ratio was stressed again that resale profits are not recoverable when there is a market, since normally what is contemplated in the usual course of things on non-delivery is that a plaintiff/buyer will go into the market and buy similar goods to honour his resale contracts when there is an available market.

If the first rule of *Hadley v Baxendale*[2] does not apply, we now examine the circumstances if they could qualify for the second rule; the actual knowledge of special circumstances, viz whether details of such potential loss were made known to the contract breaker before or at the time of contract so that the contract breaker can be said to have taken the risk of such loss into the bargain of the contract. For example in *Hall v Pim*,[11] in which the contract for the sale, as found by Viscount Haldane, between the parties provided for sub-contracts of resale of the same goods and showed that the seller had contracted to put the buyer in a position to fulfil his sub-contracts. Thus, sub-contracts were in our view, brought to the express notice of the seller at that time of the contract and the sub-contracts were in the contemplation of both parties and therefore damages for loss of profit for sub-contracts were allowed in that case.

Here, the matter of sub-sales was not communicated to the said vendor at the time of the contract and this is beyond dispute from the evidence for the sub-sales were in fact transacted after the date of contract between the parties herein but before delivery. Thus the specific loss of profit on 15 units of the goods in question sold before delivery and after contract could not be claimed as it was too remote by virtue of both rules in *Hadley v Baxendale*.[2] The specific loss of profit for the remaining unsold nine units of goods in question could not be claimed for the same reason, specifically because of the first rule in *Hadley v Baxendale*.[2]

A It is regretted that the case of *Hadley v Baxendale*[2] was not cited by anybody before the learned registrar and the learned judge.

The award of loss of profit in the sum of RM1,766,429 made by learned registrar and upheld by the learned judge below cannot stand due to the remoteness and has to be set aside.

B Having disallowed the loss of profit, we next consider if the said buyer is entitled to any damages for breach of contract other than the loss of profit which we have just rejected. We look at the evidence, bearing in mind the normal measure of damages, ie the difference between contract price and market price at the date of the breach, ie on 27 July 1987, and bearing in mind also the date of 6 May 1987, ie the date of contract. DW2 testified C that from the period of May 1987 up to December 1987, there was in fact no increase in price for goods similar to the goods in question. DW1 said in fact that for the similar period, business in second-hand equipment similar to the goods in question was very bad. Such evidence was not even challenged. The said buyer has thus failed to prove any damage for the non- D delivery of the goods in question, apart from proving a breach of contract for such non-delivery.

It will have been noticed, in passing, that the normal measure, ie the difference between contract price and market price, etc, is in fact the first rule in *Hadley v Baxendale*,[2] or in other words, it is applied for assessing compensation for damage which is not excluded by *Hadley v Baxendale*.[2]

E On the award for loss of opportunity, we have set out the gist of evidence in regard thereto, such loss cannot pass the test of remoteness laid down in *Hadley v Baxendale*,[2] either on the first rule or the second rule in question.

The award for loss of opportunity at RM456,268 cannot stand and has to be set aside.

F Though the said buyer has failed to prove damage for both loss of profit and loss of business opportunity, it has succeeded in proving loss of sale commission when the challenge against such award was withdrawn before us at the outset of the hearing, and the award of RM120,000 for such loss of sale commission therefore stands. In view of this award, any other G separate award by way of nominal damages for the infraction of the legal right, ie breach of contract for non-delivery of the goods in question, would be unnecessary.

We therefore allow the appeal by setting aside the order of the court below dated 12 March 1992 and substitute therefore an order that the appellant do pay RM120,000 only to the respondent as damages for loss of H sale commission, with interest thereon at 8%pa from the date of the original registrar's order, ie 24 May 1991, until satisfaction and that the respondent do pay to the appellant costs of this appeal here, but that the costs in the court below are to be paid by the appellant to the respondent instead.

Appeal allowed.

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Reported by Prof Ahmad Ibrahim